Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF McLeodUSA

McLeodUSA Incorporated, including its subsidiaries (McLeodUSA Telecommunications Services, Inc., Ovation Communications, Inc. and its subsidiaries, and Dakota Telecommunications Group, Inc. and its CLEC subsidiaries) (collectively "McLeodUSA") submits its comments pursuant to the Notice of Proposed Rulemaking and Notice of Inquiry (hereinafter "Notice of Inquiry") in the above captioned proceeding and Public Notice DA 99-1563, released August 6, 1999, and files its initial comments on access to public rights-of-way and the municipal regulation of, and fees charged to, carriers for such access.

McLeodUSA is one of the nation's fastest growing Integrated Communications Providers (ICP). McLeodUSA is a provider of integrated telecommunications services to residential and business customers in twelve Midwest and Rocky Mountain states, with 16 switches and 8500 route miles of fiber optic network. Currently, McLeodUSA provides competitive local service to about 166,000 customers (including 105,000 residential customers).

INTRODUCTION

McLeodUSA has found that in many circumstances, its ability to provide telecommunications service in a timely and cost effective manner has been severely hampered by municipal action and inaction which makes it difficult, time consuming, and costly to use municipal rights-of-way to provide telecommunications services. Three years after the passage of the Telecommunications Act of 1996 (in which Section 253 was to provide for efficient, competitively neutral management of municipal rights-of-way), McLeodUSA's experience has been that Section 253 has not been implemented in a manner that achieves this goal.

McLeodUSA has found that municipalities have been very wary of CLECs and/or have seen them as a potential new source of revenue. These attitudes have resulted in municipalities considering and often adopting regulations or ordinances that have had a chilling effect upon competition. In addition to exorbitant fees, some municipalities have imposed a broad range of regulations that often duplicate existing regulatory requirements and encroach upon the federal and state roles in regulating communications. Even though the carriers have sometimes prevailed upon the local governments not to adopt the more onerous provisions considered, the Commission should recognize that significant resources have been expended by the entire industry simply attempting to hold back a flood of new ordinances which do not embody competitively neutral treatment. In addition, of course, carriers often have not been successful in convincing the municipalities to enact reasonable ordinances. In those cases, carriers are left with three undesirable choices: 1) agreeing to onerous terms (that often place them at a competitive disadvantage vis a vis the incumbent) just to be able to provide service, 2) engaging in expensive, protracted litigation, or 3) simply abandoning plans to provide service in the

particular community. What follows are examples from five states of the problems that McLeodUSA has experienced despite Section 253, and suggested courses of action for the Commission to help solve the problems.

I. FIVE EXAMPLES OF RIGHT-OF-WAY PROBLEMS DESPITE THE PRINCIPLES OF SECTION 253.

The following five examples from different states contrary to the spirit, and often the letter, of Section 253 of the Act. The name of the municipality has been deleted to avoid potential negative consequences.

A. Iowa

In Iowa, many local governments have attempted to impose fees that would be assessed only for prospective users of the rights-of-way. Education of the municipal officials on the 1996 Act did not convince these officials that assessing such fees on McLeodUSA while exempting the ILEC would result in discriminatory treatment in violation of the Act. In some instances where local governments would not change their positions, McLeodUSA chose not to install its telecommunications facilities. For example, while installing a "backbone" network that would transport long-haul traffic, McLeodUSA approached a particular municipality to request use of the public rights-of-way located within that City. It was McLeodUSA's intention to establish a presence using Centrex resale and subsequently build an intra-city fiber optic network (which would connect with the backbone network) to provide facilities-based local exchange services. The City insisted that McLeodUSA pay an annual per-foot fee prior to allowing any installation of McLeodUSA facilities. The City had not attempted to assess similar fees to US West and has no intention of doing so. McLeodUSA opted to install its

backbone fiber network outside of the city limits. Plans to install an intra-city network have been placed on hold. As a result, residents of that City do not have a choice for their facilities-based telecommunications provider at this time.

B. Michigan

Right-of-way issues in Michigan center on the following major points:

-- Very high application fees. Michigan has a state statute that requires application fees to be based on fixed and variable costs; yet the application fees usually charged have no connection to the fixed and variable costs, as the same fee is applicable whether running 50 feet of cable or 100 miles of cable.

-- Per foot fees. Per lineal foot fees have ranged from $.15 to upwards of $2.00 per foot. Few if any municipalities have generated a cost study to justify the fees they seek. Often they expect McLeodUSA to have such a cost study, which is impossible since they are the ones who know the costs involved. Also, some cities still fall back to the cable model, with which they are familiar, and seek a percent of gross revenue. Again, a gross revenue fee cannot be justified by a fixed and variable cost methodology.

-- Delay in reviewing and approving (or even rejecting) permits. The state statute requires permit approval or rejection within 90 days of submission. Normally, McLeodUSA has been able to get the permits within 90-120 days. We have not instituted litigation over the delays because we would like to maintain good relationships with the communities. However, as we experience longer and longer delays (sometimes upward of 8 months), this becomes less and less feasible. Most municipalities do not have ordinances applicable in these situations, and as a result there is no clear way of applying

for the permit. A requirement of review, and approval or denial within 30 days, with automatic approval for failure to respond by the municipality, would be appropriate.

-- Change of control. All cities have required a right to review in the event of change of control of ownership of the facilities, even though such a change of control is unrelated to the use of the right of way or the City's management of the right of way.

-- Competitive neutrality. While Ameritech generally pays no fees for use of right-of way in Michigan, municipalities generally require CLECs to pay such fees. It is discriminatory to not require Ameritech to pay while requiring the CLECs to pay.

-- Cable anologies. Many communities still see the telecommunications industry and ROW issues being a "cable"-like issue, and therefore want to impose the same restrictions and fees as they do the cable industry.

-- Facilities placement. Some communities seek to have utilities move facilities underground for aesthetic reasons, which is acceptable if applied uniformly. However, some communities have attempted to require McLeodUSA to install facilities underground, even though all others are allowed to remain on poles.

C. Colorado

Many cities in Colorado are using their status as "home rule" cities to disregard requirements for competitive neutrality. The cities claim that although the Act is clear that all telecommunications providers must be treated on a competitively neutral and non-discriminatory basis, the statewide franchise provided to a US West predecessor over twenty years ago precludes them from assessing fees upon US West. In response to this statewide franchise, many cities began assessing an occupation tax upon US West. In cities that have enacted such a tax,

McLeodUSA is allowed to pay the same tax and be subjected to ROW fees. This assures that both providers are being treated in a nondiscriminatory manner.

One suburban City has proposed that we enter into a fiber lease agreement where McLeodUSA would be required to lease facilities from a city-owned telecommunications utility, even though the facilities owned by the City Utility do not meet our specifications. McLeodUSA should not be required to use these facilities as a condition for use of city right-of-way.

D. Wisconsin

Although successful in entering the City of Milwaukee, McLeodUSA experienced numerous problems with another major City, and various other cities within the state. Most cities attempted to impose specific service level requirements on McLeodUSA and other telecommunications providers, and asked for detailed financial information about the company. A coalition of utility providers and the Wisconsin League of Cities met to determine whether a model agreement could be developed to address the needs of all concerned parties. Eventually, the state public service commission ("PSC") was asked to consider the matter. Several cities have decided to not impose stringent requirements such as those set forth above, since the PSC has become involved in the process.

E. South Dakota

The State of South Dakota issued a directive from the Governor's office that prior to accessing state rights-of-way, a telecommunications provider would be required to enter into an agreement whereby the telecommunications carrier would agree to provide Internet access and service to local K – 12 schools for a period of fifty years. US West was not required to enter into a similar agreement. Independent telephone companies, McLeodUSA Telecommunications Services, Inc. and Dakota Telecom Group, Inc. (a McLeodUSA company) were required to enter

into this agreement. After a series of negotiations with the state, McLeodUSA and DTG agreed to provide Internet access and service to a local K –12 school in areas where it was overbuilding an entire city. It is unknown whether any independent telephone company has entered into such an agreement with the state, or if US West has agreed to provide similar services.

II. PROPOSED ACTIONS

McLeodUSA agrees with the Association for Local Telecommunications Services (ALTS) and proposes the following five actions by the Commission:

1. Local rights-of-way management must be administered in a nondiscriminatory and competitively neutral manner. Therefore, any local requirements must be imposed under ordinances, regulations and rules of general application. Any requirement or fee that applies to one category of carrier that does not apply to another category of carrier is presumptively discriminatory and preemptable under Section 253 of the Telecommunications Act of 1996 and general principles of federal preemption. The Commission should also make it clear that it stands ready to act expeditiously on any case brought to its attention.

2. Municipalities must rule on applications to construct facilities within a reasonable period of time (30 days is presumptively reasonable) and may not unreasonable deny carriers permission to construct facilities in the municipal rights-of-way.

3. Interstate telecommunications service is under the exclusive jurisdiction of the Federal Communication Commission and may not be regulated in any manner by state or a political subdivision thereof, unless the Federal Communications Commission has explicitly delegated authority thereto. With respect to intrastate services, state law controls, but a locality may not regulate intrastate communications in any manner unless there is explicit state authority

to do so (and, of course, such regulation may not be inconsistent with federal rules and requirements).

4. Municipal regulation of the use of the rights-of-way is limited to reasonable regulation of the time, place and manner of construction of facilities. This would include such things as preservation of the physical integrity of streets and highways, control of the orderly flow of vehicles, coordination of construction schedules, and determination of reasonable bonding and indemnity requirements. This would not include such things as regulation of services, information requirements that are unrelated to the scope of the proposed construction, or any interconnection requirements.

5. Fees relating to the use of the public rights-of-way should be limited to recovery of the actual costs of administering the rights-of-way and ensuring appropriate restoration of the rights-of-way. To the extent that performance or other bonds are required, they must be limited to the amount necessary to ensure compliance with restoration requirements. All such fees must be publicly disclosed and should be recovered in a competitively neutral manner.

Respectfully submitted

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by

October 12, 1999
Cedar Rapids, Iowa

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand delivered this 12th day of October, 1999, to the following:

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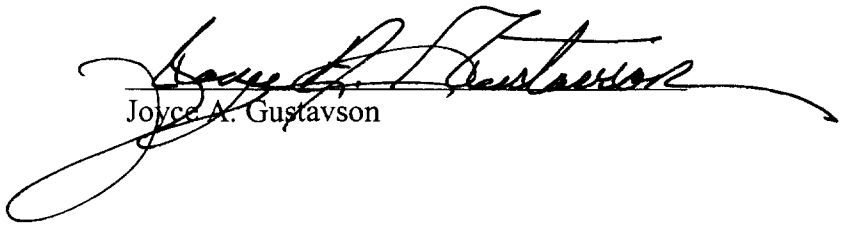

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